

Statutory Will Applications

A Practical Guide

By Richard Williams and Sam McCullough

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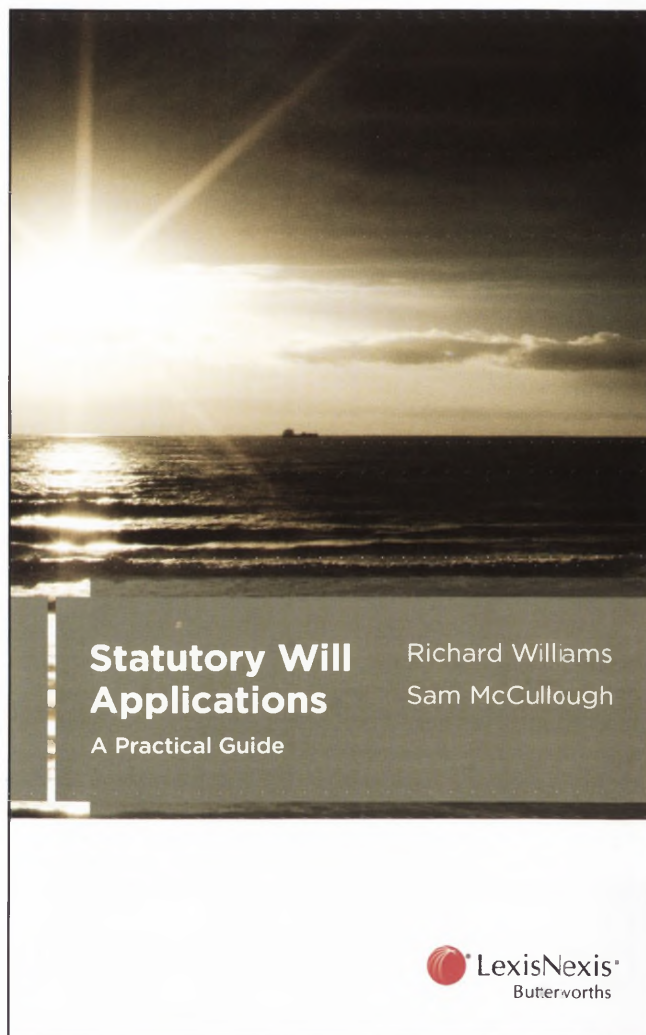
By Tina Cockburn

The jurisdiction of Australian courts to make wills for those lacking testamentary capacity is relatively new, having been granted by legislation progressively enacted across the various states and territories between 1996 and 2010. Given increasing numbers of statutory will applications since the legislative reform, and a growing body of law, the publication of the specialist work, *Statutory Will Applications: A Practical Guide*, by Richard Williams and Sam McCullough, is timely and valuable. This work will be of great interest to those who act for individual clients, especially wills and estates practitioners, but also personal injury practitioners acting for incapacitated persons who have been awarded substantial damages.

As explained by Justice Palmer in *Re Fenwick*,¹ the exercise of the statutory wills jurisdiction involves applying the 'core test' (which focuses on the proposed testator's likely intentions), to strike a careful balance between competing policy considerations relating to: the extent to which the state should interfere with testamentary freedom; how best to promote the autonomy, the wishes and best interests of incapacitated persons; and addressing issues of consistency and coherence with existing laws such as forfeiture provisions, intestacy rules and the power to make further and better provision from an estate.

Relevant legislative provisions are found in the succession law legislation of the various states and territories. For example, in Queensland the *Succession Act (Qld) 1981* was amended in 2006 to grant jurisdiction to make statutory wills.²

The authors have more than fulfilled their stated aim to 'provide a practical commentary that includes a consideration of the various circumstances in which a statutory will application may be appropriate, the steps involved in preparing an application, and approaches that can be taken when acting on behalf of interested persons'. As noted by the Honourable Justice Tom Gray in his foreword, this well-



researched work will be invaluable for anyone wishing to master this new branch of succession law.

In the first chapter (the *Introduction*), the authors trace the history of the jurisdiction from its English origins and the development of the Australian legislation, with helpful references to the law reform consultations and reports leading up to enactment.

Chapter two, *The statutory framework*, contains a detailed overview of the legislation enacted across Australia, summarising key features in a helpful table of comparative provisions. The authors then consider the distinguishing features of the various legislative schemes by reference to substantive provisions (such as standing, the core test,

threshold requirements, information to be provided by the applicants, etc) and procedural requirements.

Chapter three, *When a statutory will may be required*, provides helpful insights for those wishing to understand the factual circumstances in which an application for a statutory will should be considered. The chapter helpfully classifies the cases by reference to three broad, overlapping categories: adjusting beneficial entitlements under an existing will or an intestacy; resolving problems with an existing will or intestacy; and estate planning. For example, personal injury practitioners might note the references to cases such as *Hoffman v Waters*,³ where a statutory will application was made to adjust beneficial entitlements under an existing intestacy and to facilitate estate planning by protecting a vulnerable beneficiary. In that case, a statutory will was made in favour of an unpaid carer (the mother), following the award of substantial damages in personal injury litigation arising out of catastrophic injuries suffered in a car accident during infancy. More recently, in *Re K*,⁴ a statutory will was made where a 16-year-old mature minor anticipated a significant personal injury award. His mother had been his sole carer since he had suffered severe injuries in a car accident aged 4. He had no relationship with his father. Even though K did not have testamentary capacity (as he was under 18), he gave clear evidence that he wanted his mother to inherit his estate if he predeceased her.

Chapters four (*Acting for the applicant*), five (*Acting for other interested persons*), six (*Family provision*), seven (*Costs*), ten (*Precedents*) and eleven (*Case studies*) provide extremely useful practical guidance for practitioners. In particular, Chapter eight, *Review of case law*, contains concise summaries of the approximately 50 decided statutory will cases, arranged according to jurisdiction, with helpful catchwords to assist busy practitioners identify relevant cases.

The book is well researched, easy to read and generally well structured and indexed. In particular, the Catchword Index, which precedes the general index, will undoubtedly assist readers to quickly locate cases and commentary relevant to specific aspects of the statutory wills jurisdiction.

Overall, *Statutory Will Applications: A Practical Guide* is a thoughtful and comprehensive account of a growing area of law. It will be essential reading not only for lawyers, but also other professional advisers practising in the area of estate planning, such as accountants and financial planners. ■

Notes: **1** *Re Fenwick; Application of JR Fenwick & Re Charles* (2009) 76 NSWLR 22, [9]. **2** For a discussion, see Tina Cockburn and Barbara Hamilton, 'Wills Testamentary Capacity and Compensation Awards' (2010) November *Proctor* 14. **3** [2007] SASC 273. **4** [2014] QSC 94.

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